IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARY GARROW,
Plaintiff/Appellant,

v.

JOANNE EARLEY; WELLS FARGO BANK, N.A.,
Defendants/Appellees.

No. 2 CA-CV 2018-0053
Filed November 29, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20175246
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Mary Garrow, Tucson
In Propria Persona

Jaburg & Wilk P.C., Phoenix
By David L. Allen and Aaron K. Haar
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 Mary Garrow appeals the trial court's order dismissing her cause of action for failing to state a claim upon which relief can be granted.[1] For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 9 (2012). In October 2016, Joanne Earley, a manager at a Wells Fargo branch, ordered Garrow to leave the branch for talking on her phone while she was waiting to cash a check. Garrow left and called the police. After conferring with bank employees, the responding officer informed Garrow she was not permitted to enter the branch.

¶3 On October 31, 2017, Garrow filed a lawsuit in superior court against "Joann[e] Earley Wells Fargo Manager" alleging intentional infliction of emotional distress, harassment, intimidation, hostile environment, and a violation of her civil rights based on the 2016 incident. She alleged the bank manager had not followed the proper procedure before banning her from the branch, intimidated her, created a hostile environment, humiliated her in front of other witnesses, and forced her to drive to a more distant location to conduct her business, causing her to suffer "severe emotional distress and possible bodily harm." Her complaint sought $60,000 in damages.

[1]Garrow requests "latitude" and "leniency regarding the outcome of this case" based on her status as a pro se litigant. But it is well-established that a self-represented civil litigant "is given the same consideration on appeal as one who has been represented by counsel," and "is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer." *Higgins v. Higgins*, 194 Ariz. 266, ¶ 12 (App. 1999).

¶4 On November 22, 2017, Wells Fargo and Earley ("Wells Fargo") moved to dismiss Garrow's complaint for failure to state a claim upon which relief can be granted.[2] *See* Ariz. R. Civ. P. 12(b)(6). A few hours later, Garrow applied for entry of default based on Earley's failure to respond to the complaint. In December, Garrow filed a response to Wells Fargo's motion, which included additional factual allegations and additional claims—including assault, battery, defamation, and negligence. Garrow did not file an amended complaint or seek leave of the court to do so. *See* Ariz. R. Civ. P. 15.

¶5 The trial court granted Wells Fargo's motion to dismiss and entered final judgment. Garrow appealed.[3] We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Default Judgment

¶6 Garrow first argues the trial court erred in considering Wells Fargo's motion to dismiss, contending the motion was untimely, and the court therefore should have entered default judgment upon receipt of her application for entry of default. However, filing a motion to dismiss procedurally precludes the entry of default judgment under Rule 55(a), Ariz. R. Civ. P., which allows entry of default only when a defendant fails to plead or otherwise defend as provided by the rules. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, ¶ 17 (App. 2013). Wells Fargo's motion to dismiss was filed prior to Garrow's filing of her application for entry of default judgment, thereby precluding entry of default. We see no error.

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[2]Although it is unclear whether Garrow initially intended to include Wells Fargo as a defendant in her complaint, the parties and the court treated Wells Fargo as a named defendant once it filed the motion to dismiss on Earley's behalf.

[3]Garrow's notice of appeal was premature, as it was filed after the trial court's written ruling, but before the court issued a final, appealable judgment. Because we can determine the court actually entered judgment on the ruling which Garrow sought to appeal, we consider her notice to have been filed on the date of, and after the entry of, the court's final judgment. *See McCleary v. Tripodi*, 243 Ariz. 197, ¶ 19 (App. 2017); *see also* Ariz. R. Civ. App. P. 9(c).

Motion to Dismiss

¶7 Garrow also argues the trial court erred in concluding she had failed to state a claim upon which relief could be granted. "Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [the plaintiff] would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Coleman*, 230 Ariz. 352, ¶ 8 (quoting *Fid. Sec. Life Ins. v. State Dep't of Ins.*, 191 Ariz. 222, ¶ 4 (1998)). We review de novo the dismissal of a complaint pursuant to Rule 12(b)(6), looking only to the pleading itself. *See id.* ¶¶ 7-9. Garrow's response to the motion to dismiss added allegations that were not included in her complaint, but it was not a pleading within the definition of Rule 7, Ariz. R. Civ. P. We thus limit our review to the allegations in Garrow's original complaint.[4]

¶8 Garrow's complaint first alleged intentional infliction of emotional distress ("IIED") based on the manager's "hostile and unprofessional" conduct. In order to successfully plead a claim of IIED, a plaintiff must allege the defendant's conduct was extreme and outrageous, the defendant intended to cause emotional distress or recklessly disregarded the near certainty such distress would result from his or her conduct, and severe emotional distress occurred as a result of the defendant's conduct. *See Ford v. Revlon, Inc.*, 153 Ariz. 38, 43 (1987). "A plaintiff must show that the defendant's acts were 'so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554 (App. 1995) (quoting *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 562 (1969)). "The trial court must determine whether the acts complained of are sufficiently extreme and outrageous to state a claim for relief." *Id.*

¶9 Even assuming the veracity of the facts enumerated in the complaint and drawing all reasonable inferences therefrom, as we must, *Coleman*, 230 Ariz. 352, ¶ 9, Garrow essentially claimed that the bank manager was rude and ignored company policy in ordering her to leave the branch in front of other people. Such conduct does not satisfy the rigorous

[4] Although the trial court analyzed the additional allegations in Garrow's response as an apparent matter of courtesy, they need not have been considered in evaluating Wells Fargo's motion to dismiss until Garrow included them in an amended complaint. *See Coleman*, 230 Ariz. 352, ¶ 9 (courts look only to pleading itself when adjudicating 12(b)(6) motion).

requirements for a claim of IIED, which requires conduct so abhorrent that it cannot be tolerated in a civilized society. We see no error in the trial court's determination that Garrow had failed to state a claim for IIED.

¶10 Garrow's second claim was that the manager violated her civil rights by asking her to leave the branch. The Civil Rights Act of 1964 prohibits discrimination or segregation in places of public accommodation on the basis of "race, color, religion, or national origin." 42 U.S.C. § 2000a. Thus, in order to plead a successful claim under the Act, a plaintiff must allege he or she faced discrimination or segregation on the basis of race, color, religion, or national origin.

¶11 Garrow's complaint did not allege she faced discrimination or segregation based upon any of the factors enumerated in the Civil Rights Act. Instead, her complaint alleged she was asked to leave for "being loud" while talking on the phone. She therefore failed to state a claim for a violation of the Act, and we see no error in the dismissal of her claim.

¶12 We are not aware of, and Garrow does not cite in her complaint or on appeal, any law establishing a freestanding civil claim for any of the remaining claims in her complaint—namely harassment, intimidation, or hostile environment. We therefore do not take these as independent claims requiring analysis separate from Garrow's IIED and civil rights claims. And while such allegations might in some circumstances support a claim for IIED or a civil rights violation, here they do not. We see no error in the trial court's dismissal of Garrow's complaint.

¶13 In her opening brief, Garrow also argues the trial court erred in dismissing her claims for assault, battery, and negligence. However, she first mentioned those claims in her response to the motion to dismiss; they were not included within her complaint. And, as noted above, she did not file an amended complaint or seek leave to do so. Accordingly, those claims were never properly before the court and we therefore do not address them on appeal. *See Coleman*, 230 Ariz. 352, ¶ 9 (review of grant of 12(b)(6) motion limited to pleading itself). Nor do we entertain her claim, raised for the first time in her reply brief, that the responding officer, a non-party, denied her equal protection by refusing to escort her back into the bank. *See Nelson v. Rice*, 198 Ariz. 563, n.3 (2000) (issue first raised in reply brief not considered on appeal).

Disposition

¶14 The trial court's judgment is affirmed.